

Limiting the Risk of PI Claims During the Coronavirus Pandemic

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Away from the immediate health ramifications of the C19 pandemic, the government's guidance – in terms of office closures, travel restrictions and self-isolation - provides the perfect storm for errors and omissions to occur within law firms struggling to cope with staff absences. This practical guide seeks to highlight some of the main areas of concern and what might be done to mitigate the risk of problems arising.

Operations management

- Have you stress-tested your remote and agile working capabilities? Arrange a 'test day' if possible – whereby all staff work remotely - to review how robust the systems and processes are, and make any adjustments where issues arise. Do this before remote working may be forced upon offices.
- Check your video-conferencing facilities have updated software and that everything works. Consider adopting Skype - or other internet-based software that could be used at home - as a temporary alternative to any fixed office-based systems.
- Has your IT system recently been subjected to penetration-testing by your in-house team or external consultants? IT security is paramount at this time and vulnerability testing will help to identify potential weaknesses in your IT system.
- Follow government guidance specifically for coronavirus and retain an audit trail of this.
- Establish communication channels to keep in touch with employees. Regular telephone calls, messages and/or emails across different social media platforms and both personal/work numbers should form part of your contingency planning. A daily bulletin might be sent to establish these new lines of communication. Obtain personal emails and landline/mobile numbers for employees if not already held (consider data protection obligations here).
- Firms that are running at or near capacity (i.e. all staff are being fully utilised) are likely to feel staff absences most acutely. How lean are you running? Where is the spare capacity? If possible, put the spare capacity where you feel it is most likely to be needed now. If you have little/no spare capacity, do you have access to locum services or short term secondments if required?
- Assess your staff sickness policy and decide what – if any - discretion you might be willing to apply to take account of C19; will you continue to pay staff that are self-isolating whilst asymptomatic even if they cannot work remotely? For how long? What about those who need to be at home to look after sick relatives or children, whose schools have closed?
- What are your clients doing? See if they will disclose how they are working to check if you can adopt similar measures and have a compatible arrangement to theirs.

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Non-contentious work

- Emphasise to clients that a planned postponement of their proposed transaction is likely to be preferable to an emergency cancellation or distressed abandonment. Clients carrying insurance may not be covered for aborted projects due to C19, so the situation needs to be well managed if firms are to avoid angry clients and the potential for claims.
- Fraudsters and cybercrime opportunists thrive in situations where their victims have taken their eye off the ball. If firms are forced to operate with skeleton staff levels and remaining members of staff are forced to work harder to cover the gaps, the potential for criminal infiltration inevitably rises. Ensure there is a policy for handling client monies and for checking the destinations of account transfers. Introduce refresher training where necessary, to ensure maximum awareness of risk factors. Identify areas where corners are most likely to be cut – and where systems may be most prone to third party infiltration - and implement strategies to mitigate the potential effects of these if at all possible.
- Construction projects are likely to experience delays. Check agreements to see what force majeure clauses and frustration of contract provisions are in force, and advise clients early.
- Transactional work may be time-dependent, particularly with lender and funder involvement, and communication with stakeholders is paramount. Work with your opposite number to ensure the project can be delivered and build in realistic contingencies and delay periods.
- Where instructed to draft new contracts for projects that are to run over the remainder of this year, consider including express infection disease/epidemic wordings, force majeure clauses and/or insurance arrangements to mitigate against the possibility that C19 and its effects may continue to be felt for some considerable time yet.

Litigation file handling

- Conduct a 'cabinet review' of all open files and note key dates such as:
 - Limitation
 - Pre-action Protocol response dates
 - Litigation timetable dates.
- Put all key dates on all files together in one location (e.g. a communal diary or central database), which will make it easier to ensure that all files are covered in the absence of any of the day-to-day case handlers.

Litigation risk minimisation

- Consider case-management measures to cater for possible emergency staff absences, such as entering into protective Standstill Agreements to extend limitation or seeking extensions to any existing timetables to ensure the situation remains capable of being controlled. Where necessary, protective proceedings could be issued now to preserve the limitation position, particularly if limitation is otherwise likely to expire over the next six months (i.e. during the anticipated lifespan of the pandemic).
- Prepare a checklist for Court Directions as a point of reference and to create an audit trail. This should include lead-in time considerations that depend upon the availability of others linked to litigation – client, experts, counsel, etc. You should keep in touch with these people regularly to ensure you become aware of any health issues or unavailability at the earliest point in time.
- Use the "Buffer Rule" available under CPR r 3.8(4), to agree extensions of time by up to 28 days consent where possible to avoid breaching a Court timetable.
- Adjudications, subject to a strict statutory 28-day timetable, may not be possible to complete. Speak with your opponent and the adjudicator to agree how best to accommodate the impact of C19 within the timetable. If it cannot be accommodated,

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consider whether the adjudication process can either be suspended or abandoned during the lifespan of the pandemic, on grounds of natural justice.

- Create a template to be used for relief from sanction applications specifically addressing coronavirus issues – such as fee earner shortages, unavailability of clients, experts, etc. Such applications should be prepared and lodged at Court as a pre-emptive measure prior to breaching any deadline. Seek to agree extensions by consent and lodge this as a jointly signed consent order. The coronavirus is likely to be a “good reason” under the Denton test; however a pre-emptive application improves the prospects of success to avoid the risk of failing under the “promptness” limb.

Closing thoughts

The above is obviously a counsel of perfection and not all of the measures we suggest will be capable of being implemented within the time available. However, we hope that this provides you with some food for thought as to what other protective measures might be taken to prepare for what may be to come.

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